No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

L. CHARLES JOHNSON
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GATEWAY PRINTERS—POCATELLO

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STATEMENT OF PLEADINGS AND JURISDICTION

This action was commenced in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, by filing of Complaint on or about January 7, 1957, (R. 7-9) and Summons was issued in said cause being then state cause number 19826, and upon the appearance by defendant a petition for removal was duly filed (R. 3-5), and Order of Removal in said cause 19826 was duly signed by the District Judge of the District Court of the Fifth Judicial District, The Honorable Darwin D.

Brown, on February 4, 1957 (R. 10-11). Jurisdiction is based upon diversity of citizenship and the amount in controversy exceeding $3,000.00 exclusive of interest and costs (R. 7-9 and R. 11-14). After Removal appellant filed Amended Complaint (R. 11-15) with Amendment made thereto (R. 14-15, R. 47-48), and respondent filed answer thereto (R. 17-23). The Jurisdiction of the District Court is invoked pursuant to action removed under 28 USCA 1441 and this being a civil action over which said District Court had original jurisdiction pursuant to 28 USCA 1332. On February 17, 1958, the District Court made Findings of Fact and Conclusions of Law and duly filed the same (R. 38-43) and entered Judgment in favor of defendant and against plaintiff (R. 44), and on March 17, 1958, Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, was duly filed by plaintiff (R. 45) along with Bond for Costs on Appeal (R. 45-46).

The Jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under 28 USCA sections 1291 and 1294.

QUESTIONS PRESENTED

The following questions are raised by appeal from the Judgment entered by the Honorable District Court:

I.

Could the District Court have held that appellant was not a bona fide purchaser for value?

II.

Should the Trial Court have concluded that in the state of Idaho a certificate of title is a condition precedent to the acquiring of an insurable interest in a trailer home.

III.

Should the Trial Court have concluded as a matter of law from the purported sale of the trailer house from Joseph Roberts and Albert Pauls to the appellant on May 17, 1956, that the appellant gained no right, title or interest in and to said trailer house by reason of said sale?

IV.

Should the Trial Court have concluded as a matter of law from the evidence presented including the contract of insured, that the appellant by the transfer of $2,000.00, received no insurable interest in said trailer house, and thus at the date of delivery to her of the insurance policy, had no insurable interest in said trailer house, and at the time of the damage of said trailer house by fire on September 23, 1956, the appellant had no insurable interest in the trailer house?

V.

Was the Trial Cout in error in entering judgment for the appellee and should not have judgment been entered

in favor of the appellant and against the appellee?

VI.

Could the court have entered and made findings of fact IV, V, VI, VIII, IX, X, XI, or any of them, under the evidence, and were the conclusions of law, all or any of them, justified under the evidence as the same was introduced?

VII.

Were any of the title questions as between Beatrice Nelson, the plaintiff to this lawsuit, and Supreme Trailer Company and Southwest Mobile Homes Sales Corporation relevant in an action on a contract of insurance policy as between Beatrice Nelson and New Hampshire Fire Insurance Company, the Appellee?

VIII.

Should the Trial Court have held under the facts as the same were introduced that under Idaho law appellant failed to prove grounds for relief, or that under Idaho law the facts show any valid defense to the claim of appellant or which defense appellee is entitled to assert.

STATEMENT OF FACTS

May 17, 1956, Beatrice Nelson of American Falls, Idaho, purchased a large 2 axle 4 wheel (Exhibit 16) 1956 Supreme

Trailer Home number 6955 (Exhibit No. 4, R. 55-59) for her own use and benefit and as and for a home (R. 61 and 65). Beatrice Nelson paid $2,000.00 for the 1956 Supreme Trailer Home (Exhibit No. 5, R. 57-58). Mrs. Nelson had been looking at trailer homes with the idea of purchase (R. 65). In American Falls, Idaho, her friends knew of her desire to purchase a trailer home. (R. 56). On May 17, 1956, two men with a trailer home for sale, Joseph Roberts and Albert Pauls, had a meal at a restaurant owned by Dan H. Bates and Dan H. Bates thereafter introduced these two men to Beatrice Nelson (R. 83-84). These two men offered to sell the trailer home because it had been damaged and allegedly would be rejected when delivered (R-70). Bates in turn informed Beatrice Nelson of the trailer home which seemed a good buy at $2,000.00 (R-56).

Beatrice Nelson recorded as a matter of public record the Bill of Sale which Bill of Sale shows thereon the consideration of two thousand dollars (Exhibit 4).

Thereafter during June, 1956, H. Dean Peterson, an agent of New Hampshire Fire Insurance Company (R. 23 admission, R. 25 Response) called on Beatrice Nelson in response from her inquiry to Bryan & Co., about insurance (R-59). The agent attempted to maximize the coverage and Mrs. Nelson informed him his estimates of value were over the actual purchase price (R-103-104, R-60). Beatrice Nelson agreed to buy $5,000.00 coverage and New Hampshire Fire Insurance Company agreed to sell this coverage. (R-61, R-104). On June 12 1956, New Hampshire Fire

Insurance Company issued to Beatrice Nelson a policy on the 1956 Supreme Trailer House insuring against loss by fire in an amount up to $5,000.00, (Answer R-19) and the policy being A-23-80-27 (R. 27, 28, 53, 55, Exhibit 3), Beatrice Nelson paid the premium on said policy for all times relevent (R. 27-28, 61), and on September 23, 1956, there was in effect said policy number A-23-80-27.

The policy was prepared by the insurer and on the first page of policy stating "Actual Cost When Purchased Including Equipment" was filled in by the agent of insurer and the figure used did not come from Beatrice Nelson (R-104).

Beatrice Nelson waited for the sewer line connection and then lived in the trailer house during the period of six weeks up to September 23, 1956 (R-61 and R-65).

In its answer the New Hampshire Fire Insurance Company admits: On June 12, 1956, the retail value of said trailer home to be at least $5,895.00 (R-20). The following statement was admitted.

> 15. "Do you admit the trailer house on which you issued Policy No. A 23-80-27 was damaged by fire during September 1956, and prior to September 24, 1956? (R-24).

On September 23, 1956, the trailer home was damaged by fire, (R. 61), the following Stipulation was made:

The Court: I don't know how much evidence you have as to the damages here, Mr. Johnson, is it not possible for (44) counsel to agree that if the Plaintiff is entitled to recover that the damage to the trailer would be a certain amount of money or the difference in value?

Mr. Martin: I think we could, your Honor.
(Off the record discussion by counsel.))

The Reporter: May I have the stipulation, please?

Mr. Johnson: The Stipulation being: It is stipulated by and between counsel that the value of the Supreme Trailer Home, number 6955, being the subject trailer home of this litigation, had a value immediately preceding the fire on September 23, 1956, of $5,895.00 and immediately after the fire which occurred September 23, 1956 the trailer had a value—a full fair market value of $1,267.50, upon such September 23, 1956: Is it so stipulated, counsel?

Mr. Martin: It may be so stipulated. (R-82).

On behalf of respondent insurer (R. 97) H. Dean Peterson and Stanley Smith investigated the fire and damaged trailer home a tthe site on the date of the fire September 23, 1956 (R. 95). On October 18, 1956, Stanley Smith, determined the subject trailer home was reported stolen (R. 96 and 92).

Insurer months after the September 23, 1956 fire, by

endorsement to the same policy A 23-80-27, insured a new trailer, that is, changed the item from the 1956 Supreme Trailer Home to a 1956 Angelus Trailer Home (Exhibit 14, R. 106-109).

Beatrice Nelson after the fire informed of a possible title question immediately secured an Idaho Title Certificate (R-77). No suit has been or was filed against Beatrice Nelson by Supreme Trailer Company the manufacturer of the trailer, or Southwest Mobile Homes Sales Company the selling agent of the manufacturer of the trailer, or Great American Indemnity Company the bonding agent of the preceding two companies and to whom a certificate of origin was allegedly issued by the preceding two companies (R 124-125, R. 150 and R. 145). After the fire Beatrice Nelson sold the subject trailer house (R. 150).

Beatrice Nelson, after seeing her attorney (R-56), having received a Bill of Sale, Invoice and Inspection sheet (R-58) and noted Roberts was an agent of Supreme Trailer Sales by him wiring it and receiving sixty dollars from it (R-142) paid for (R. 57-58) and took possession of the trailer home (R. 56). After filing suit Beatrice Nelson learned that the employee of Supreme Trailer Sales Joseph Roberts and his companion Albert Pauls apparently absconded with the $2,000.00 (Answer to Interrogatories of M. H. Rodgers R. 33) and with the $60.00 wired Joseph Roberts in American Falls, Idaho by Supreme Trailer Sales (R. 142-143). Joseph Roberts was employed by Supreme Trailer Sales to deliver the Supreme Trailer home from Bon-

ham, Texas to Boise, Idaho (R. 136-137). It is the procedure of Supreme Trailer Sales to collect on delivery (R. 117, R. 76), the driver being required to so collect (R. 118).

On the invoice it states "In the event of payment by check other than a cashier's check or a certified check, it is expressly understood that title shall remain in the seller until said check is honored." (Exhibit 6, R. 132)). Because of this Beatrice Nelson made out a personal check to the employee of Supreme Trailer Sales Joseph Roberts (Exhibit 5 R. 57-58), and the employee of Supreme Trailer Sales took the check to a local bank and cashed it so he could be assured the check would be honored (R. 56). It was honored and Beatrice Nelson was given her Bill of Sale.

Beatrice Nelson in due course submitted a proof of loss to the insurer and demanded $4,627.50 from the insurer, being the difference in the values immediately prior to and immediately after the covered damage and within the $5,-000.00 policy damage limits (Exhibit 1 and Exhibit 2, R. 52, 53). Insurer denied Beatrice Nelson her monies without any reason being given her for so doing, and February 1, 1957, suit was filed for $4,627.50 and attorney fees (R. 7-9) in the appropriate state court. Februray 4, 1957, the cause was removed to the Federal District Court by defendant.

No proper tender back to Beatrice Nelson of her premium was made by insurer.

Trial was had and Judgement was entered for defend-

ant. Plaintiff contending the trial judge erred in entering judgment for defendant, and in findings of fact, and conclusions of law appeals to this court.

SPECIFICATION OF ERRORS

I.

That the Trial Court erred:

(a) In finding of fact IV in the last clause thereof "not affecting the value thereof" as there is nothing in the record supporting such finding.

(b) In finding of fact V as to the finding that appellant was "fully conversant" with the prices and values of trailer houses.

(c) In finding of fact VI in holding and finding that "the plaintiff knew or by the exercise of any degree of care or caution should have known that neither the said Roberts nor the said Pauls had any right, title or interest in or to said trailer house or any right to sell or dispose of the same and that the plaintiff herein was not an innocent purchaser of said trailer house or a purchaser for value" for the reasons that the evidence does not support said findings and the evidence is uncontradicted that appellant was a purchaser without knowledge of any encumbrance or title defect and that appellant paid $2,000.00 consideration for the trailer house therefore being unequivocally an innocent purchaser for value under the laws of the State of Idaho.

(d) That the Court erred in finding of fact VIII to the effect that there was no disclosure to appellee by the appellant of the facts of the purchase of the trailer house for the reason that there is no evidence of any refusal by appellant to answer any inquiry of appellee or it agents concerning said facts of purchase or any other facts.

(e) In finding of fact IX in holding and finding "that at the time the plaintiff applied for and procured said policy of insurance, she had no insurable interest in said trailer house" as the evidence is to the contrary.

(f) In finding of fact X in holding and finding the appellee timely tendered back to the appellant the premium she paid for the insurance policy as the evidence is to the contrary.

(g) In finding of fact XI in holding and finding "that the plaintiff had no insurable interest in said trailer house at the time of the occurrence of the fire and has no claim whatsoever upon or against the defendant by reason of said insurance policy" as the evidence is to the contrary.

II.

That the Trial Court erred:

(a) In Conclusion of Law number I, for the reason that Joseph Roberts had apparent authority to pass title and in any event appellant by said purchase acquired an insurable interest in and to said trailer house.

(b) In Conclusions of Law number II and number III, for the reasons that appellant at the relevant dates having actual possession, bill of sale and other incidents of ownership had therefore an insurable interest in such trailer house.

The Court further erred in Conclusion of Law IV, V and VI for the reason that the Trial Court misconceived and misapplied Idaho law.

III.

The Trial Court erred in holding and finding relevant, in determining the contractual rights and duties between an insured and an insurer, the title questions between insured and third parties concerning subject trailer home in possession of insured both at the time of issuance of policy and the date of loss, and otherwise failing to recognize the difference between a title contest over personal property and a contractual claim based on an insurance policy.

IV.

That the evidence is wholly insufficient to support any affirmative defenses of appellee and thus to support the judgment entered, and under the rule of law of Idaho appellee failed to void the insurance contract sued upon.

V.

That the evidence discloses without contradiction the

appellant entitled to recover $4,627.50 under the terms of the contract of insurance, and reasonable attorney fees for prosecution of this action.

VI.

That the judgment entered is against the law for the reasons set forth herein and is unconstitutional and abridges the freedom and rights of the parties to contract.

VII.

That the cause having been determined and governed by the rules of law of the State of Idaho, it was the duty of the Court to follow such rules of law, and said rules of law of Idaho provide by definition that an insurable interest is any interest in property or in relation thereto or liability in respect thereof and that the insured need not prove existence of insurable interest and the burden to show lack of insurable interest, if any, is upon the insurer, and in this cause there is no evidence showing the appellant did not have an insurable interest.

VIII.

That the trial court erred in entering judgment in favor of the appellee and against the appellant.

ARGUMENT

The appellee is in this brief referred to by either term "respondent" or "appellee."

Counsel for appellee conceded and the Honorable

District Judge noted there is no question in this cause involving moral turpitude or a moral risk (R. 96).

It is the position of the appellant that the appellant without contradiction or doubt proved her cause to recover her loss from fire from insurer, and having so done no defense to such recovery by appellant was either properly raised in the pleadings or proven by appellee, and that the only apparent defense allowed to her claim would be fraud, which is without sufficient evidentiary support under the Idaho law, and appellee undoubtedly failed to show appellant did not have an interest that was insurable. In other words appellant having fully proven her cause, the facts do not support a prima facie defense for appellee. The cause having been determined and governed by rules of law of the State of Idaho it was the duty of the Court to follow such rules of law, and the rules of law of Idaho provide that an insurable interest is any interest in property or in relation thereto or liability in respect thereof, and that appellant insured need not prove existence of insurable interest and the burden to show lack of insurable interest, if any, is upon an insurer. In this cause there is no evidence showing the plaintiff did not have an insurable interest. Further, the rules of law of Idaho provide that a title certificate is not a condition necessary to acquiring an interest in or actual ownership of a motor vehicle and certainly not of a trailer home. Further, such rules of law of Idaho provide that insurance coverage is to be liberally applied to protect the insured. Further, the appellant contends that the respondent insurance carrier waived or is estopped to assert any affirmative de-

fence or defenses to payment of the risk insured against as there was neither compliance with policy terms in voiding the policy nor was there proper tender back of premium to appellant. It is the position of appellant that the trial court erred in holding and finding relevant in determining the contractual rights and duties between an insured and an insurer title questions between the insured and outside parties concerning the trailer home in this litigation which trailer home was in possession of insured under claim of title both at the time of issuance of the policy and the date of loss. In general the trial court erred in failing to recognize the difference between a title contest over personal property and a contractual claim based on an insurance policy. The judgment for defendant as well as findings supporting the judgment resulted from a misconception and misapplication of the Idaho law.

The essential question in this litigation is whether or not the appellant had an insurable niterest in the trailer house damaged by fire. The authorities are abundant in holding that *any interest* of an insured, with the singular safeguard that gambling contracts are to be avoided, is an insurable interest. The Idaho Code on the point is explicit;

> " 'Insurable interest', (property), shall mean every interest in property, or in relation thereto, or libility in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest. An interest in property insured must exist when the insurance takes effect, and

when loss occurs, but need not exist in the meantime."

Section 41-201 (14), Idaho Code.

The text books set this out, and we find this statement:

"Applying the rules just stated as to what constitutes an insurable interest it has been held that the following persons among others have an insurable interest in property; . . .; one in possession and use of property under a claim of right, although his title be defective or invalid."

26 C. J., Fire Insurance, page 24, Section 4.

Perhaps one of the most lucid and excellent statements on this is to be found in the work of Couch:

"As to property, it may be said that an insurable interest is any right, benefit, or advantage arising thereout or dependent thereon, or any liability in respect thereof, or any relation or concern therein, of such a nature that it might be so affected by the contemplated peril as directly to damnify the insured. In fact, any person has an insurable interest in property that derives a pecuniary benefit from its existence, or would suffer loss from its destruction, and this, whether he has, or has not, any title in, or lien upon, or possession of, the property itself. Any interest in property, legal or equitable, qualified or

absolute, will as a general rule support a contract of insurance thereon, since if such relation exists between the insured and the property that injury to it will, in natural consequence, result in loss to him, he has an insurable interest, as has the holder of an interest in property by the loss of which he is deprived of his possession, enjoyment, or profit, or security or lien resting thereon, or other certain benefits growing out of or dependent upon it. If there be a right of interest in property which some Court will enforce, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, where the loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest."

Cyclopedia of Insurance Law, Couch, Vol. I, pps. 756-757.

And this work further says:

"So, a title gives an insurable interest where, though not in fee, it is such that the owner would suffer a present, as distinguished from a mere expectment or prospective, loss or damage by the destruction thereof. So, the owner of the record title to property has an insurable interest therein, as has also the owner of the equitable title. In fact, an equitable interest in property is an insurable interest, and may be insured as such or it may be insured under the general

name of property. So, parties, have an insurable interest where, at the time insurance is made for them against loss by fire, they are entitled to one-third of the property by deed, and to two-thirds as mortgagee; although part is held under an agreement which has not been complied with, and which purports on its face to be void if not complied with, but which has not been declared void . . . And while any legal or equitable interest is sufficient, yet an insurable interest may exist without either, it being sufficient for instance, that the insured is so situated with reference to the property that he would be liable to loss should it be injured or destroyed by the peril insured against."

Cyclopedia of Insurance Law, Couch, Vol. I, pps. 796-797.

Such standard accepted definition or rule is well set forth in the case of Commercial Securities vs. Hall, 140 Ore. 644, 15 P2d 483, 486:

"In arriving at the meaning of an 'insurable interest,' the following excerpt from 4 Words and Phrases, Third Series, p. 346, will be helpful: 'Any person has an insurable interest in property if he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself.'

"As to what constitutes an insurable interest gener-

ally, we direct attention to the following from Cyclopedia of Automobile Law, Huddy (9th Ed.) 13, 14, P. 57: 'Whosoever may fairly be said to have a reasonable expectation of deriving a pecuniary advantage from the preservation of the subject matter of insurance whether that advantage inures to him personally or as the representative of the rights or interests of another, has insurable interest'."

* * *

"Still another pertinent observation is found in Richards on the Law of Insurance (4th Ed.) at S. 25, where the author says: 'It may be stated genarally that any legal or equitable estate, or any right which may be prejudicially affected, or *any liability which may be brought into operation, by fire,* will confer an insurable interest . . . A defeasible interest is insurable, as also is a contingent, or inchoate or partial interest'." (our italics).

See also: Home Insurance Company vs. Peoria and P. U. Ry. Co., 78 Ill. App. 137.

Welch vs. Northern Assurance Co., 223 Ill. App. 77, 83;

Allen vs. Phoenix Assoc., 12 Ida. 652, 88 Pac. 245;

Essentials of Insurance Law, Patterson, P. 291;

Hooper vs. Robinson, 98 U. S. 528, 25 L. Ed. 219;

Schaeffer vs. Anchor Mut. Fire Ins. Co., 113 Iowa 652, 85 N. W. 985.

"The authorities all agree that it is not necessary that the insured should have an absolute right of property, and that he has an insurable interest if, by the destruction of the property, he will suffer a loss, whether he has, or has not a title to, lien upon, or possession of the property itself."

Banner Laundry Co. vs. Great Eastern Casualty Co., 148 Minn. 29, 180 N. W. 997.

"A person who has no title in the property and has neither possession nor right of possession has an insurable interest therein, provided he will suffer pecuniary loss in case of the damages or destruction of the premises by fire. Home Insurance Company of New York vs. Mendenhall, 164 Ill. 458. This rule has been sustained by the authorities in all jurisdictions so far as we have been advised."

Welch vs. Northern Assurance Co., 223 Ill. App. 77, 83.

Although bare title, Bill of Sale or a Deed is suffciient, even without bare title, an interest to be insurable does not

depend upon the ownership of the property. Contingency interest or bailment or trust impressed by law or otherwise is enough. If by the loss the holder of the property be deprived of the possession, enjoyment, or other benefits growing out of or depending upon the existence of the property, he has an insurable interest.

Delanty vs. Yang Tsze Insurance Assoc., 127 Wash. 238, 220 Pac. 754;

German Insurance Co. vs. Hyman, 34 Neb. 704, 52 N. W. 401;

Bird vs. Central Manufacturers Mort. Ins. Co., 120 Or 1,120 P2d 753;

Citizens State Bank vs. State Mut. Rodded Fire Insurance, 276 Mich. 62, 267 N. W. 785;

Fullweiler vs. Traders and General Insurance Company, 59 N. Mex. 366, 285 P2d 140;

Northern Assurance Co., vs. Grandview Building Assn., 183 U. S. 308, 22 S. Ct. 133, 46 L. ed. 213.

"Interest" does not necessarily imply a right to a whole or part of the thing, nor necessarily or exclusively that which may be the subject of privation, but having some relation to or concern in the subject of insurance, which relation or concern, by the happening of the perils insured against, may

be so affected as to produce a damage, detriment, or prejudice to the party insuring. To be interested in the safety of a thing is to be so circumstanced in respect to it as to have benefit from its existence, prejudice from its destruction.

Key vs. Farmers Insurance Company, 101 Mo. App. 344, 74 S. W. 162;

North Brtiish Mercantile Insurance Co., Ltd. vs. Sciandro, 256 Ala. 509, 54 S.W. 2d 674, 27 A. L. R. 2d 1047;

LaForge vs. LeBlanc, 137 Me. 208, 18 A2d 138.

Any qualified interest in a thing insured may be legally protected by insurance.

Baird vs. Fidelity-Phenix Fire Insurance Company, 178 Tenn. 653, 162 S. W. 2d 384;

Goodel vs. New England Mutual Fire Insurance Co., 25 N. Ham. 169;

Kozlowski vs. Pavonia Fire Insurance Co., 116 N. J. L. 194, 183 Atl. 154.

It has been repeatedly held that a person having the mere right of possession of property may insure it to its full value and in his name, even when he is not responsible for its safe keeping.

Fire Ins. Assocaition vs. Merchants & Miners Transportation Co., 66 Md. 339, 7 Atl. 905;

Phoenix Ins. Co. vs. Erie & W. Transportation Co., 117 U. S. 312, 29 L. ed. 873.

Thus a bailee may recover in such circumstances under a policy insuring goods gratuitously kept in storage for another. Inasmuch as one having actual possession of a chattel, although once acquired by theft or otherwise wrongfully, has a possessory right good as against all the world except the true owner or one having a prior right of possession, and there is no reason why this qualified possessory right should not give him an insurable interest. So where an insured purchases an automobile from a thief, the better view recognizes his insurable interest therein.

Norris vs. Alliance Ins. Co., 99 N. J. L. 435, 123 Atl. 762;

Savarese vs. Hartford Ins. Co., 99 N. J. L. 435, 123 Atl. 763;

Cooley, Cases of Insurance 2d Edition.

Barnett vs. London Assur. Corp., 138 Wash. 673, 245 Pac. 3.

Therefore, "insurable interest" both by Idaho statute and at common law means *every* or *any* "interest" in pro-

perty or in relation thereto or liability in respect thereof.

The appellee asserts the problem in this law suit of whether or not a title certificate is a condition precedent to the acquiring of an insurable interest.

Of course, the burden to show lack of insurable interest is always on the insurer, there is no exception.

> Allen vs. Phoenix Assoc. Co. 12 Ida. 652, 88 Pac. 245;
>
> Giles vs. Citizens Insurance Co., 32 Ga. app. 207, 122 S.E. 890.

Although it would seem in Idaho that a person might obtain a certificate of title on a motor vahicle, and that the securing of such might under certain circumstances invoke estoppel as between adverse title claimants under section 49-404, Idaho Code; yet it would seem plausible upon reading section 49-401, Idaho Code, that a trailer home whose unladen weight is more than 2,000 pounds is not defnied as a motor vehicle. In other words, in Idaho a certificate of title is not involved in any way with personal property defined as house trailer or trailer home whose unladen weight is more than two thousand pounds.

The appropriate section of the Idaho Code defining motor vehicles for purposes as used in Title 49, Chapter 4, Idaho Code, governing certificates of title is as follows:

"Definitions.—the following words and phrases when used in this Chapter shall, for the purposes of this Chapter, have the meanings ascribed to them in this section except in those instances where the context clearly indicates a different meaning:

"B. 'Motor Vehicle' Every vehicle, as herein defined which is self-propelled and every vehicle designated to be drawn upon a public highway behind and in conjunction with a self-propelled motor vehicle, provided there shall be excluded herefrom every such vehicle so drawn, excepting house trailers, whose unladen weight is less than 2,000 lbs."

Section 49-401 (b), Idaho Code.

It might be noted that the predecessor definition which was in effect in Idaho until March 2, 1955, provided as follows:

"B. 'Motor Vehicle' Every vehicle, as herein defined which is self-propelled."

The Idaho legislature did not add to the prior law the words "and house trailers" then follow by a third category of inclusion, but apparently included only house trailers of less than 2,000 lbs.

The above statute is certainly incapable of clear meaning and is at the very least ambiguous, and therefore the

cases which involve automobiles and certificate of title are not clearly relevant to the cause before the court. This is true for the reason that the record contains no proof that the trailer home which was transferred to the appellant-insured, Beatrice Nelson required a certificate of title under Idaho law.

The appellant herein in its policy of insurance involved in this litigation, has under paragraph 10 of the Conditions of the policy A-23-80-27 specifically distinguised between a "motor vehicle" and trailer or semi trailer. The insurer considered the words motor vehicle, trailer and semi trailer to be mutually exclusive one from the other, and specifically provided that the word trailer under the policy would include semi trailer, but that "motor vehicle" to be in no way construed as meaning or embodying trailer or semi trailer (Exhibit 3).

However, even though a trailer home be a "motor vehicle" a certificate of title in Idaho is not a necessity to either ownership or an insurable interest in a motor vehicle.

As regards motor vehicles, there is a minority rule found in cases, but not followed consistently, in the States of Georgia, Iowa, Kansas, Missouri, Ohio and Texas and perhaps one other jurisdiction, and in some of these states the rule once adopted is being completely circumvented and in practice reversed, and in Texas the rule was short lived indeed. We submit such a rule has not been, and because of its absurdity, will not be adopted by forty-one states in this Re-

public. Rather the majority rule defining insurable interest taken from the reasoning of the Massachusetts and New York courts seems to be consistently applied, whether or not a motor vehicle be involved or not.

The leading case from which the majority rule springs appears to be Wainer vs. Milford Mutual Fire Insurance Co., 153 Mass. 335, 26 N. E. 877, 11 LRA 598, and see Riggs vs. Commercial Men Ins. Co., 125 N. Y. 7, 25 N. E. 1058.

Discussion on the point is found in the Texas cases, following the Massachusetts and New York rule, and are a dramatic example of how able judges can be led astray by the misapplication of statutes and circumlocution of logic on the point at issue:

Hennessey vs. Automobile Owners Ins., Assoc., 273 S. W. 1024, (wherein the Texas Court of Civil Appeals held that without complying with the theft protection statutes in Texas a sale was void and no title or interest whatever passed to the purchaser and therefore there was no insurable interest).

However, a year later the Commission of Appeals in Texas in the same Hennessey case reported in 282 S. W. 791, held exactly contrary, saying:

> "The purpose for which this act was passed is clearly expressed in the caption of the bill. It is to prevent the theft of motor vehicles. We may not presume that the purpose was other than that expressed. Its

purpose was not to prevent fraudulent sales and transfers . . . When the language used in this statute, the evil for which remedy was sought, and the effect of holding contracts void when entered into without complying with the requirements made, are all taken into consideration, we think it is manifest that the Legislature had no intention to declare void sales made where the acts required are not performed . . .

"Hennessey had an insurable interest in the property insured . . ."

Hennessey vs. Automobile Owners Ins. Assoc. (1926 Texas) 282 S.W. 791.

The next Texas case said:

"The statute is intended, merely, as a regulatory statute in respect to sales of motor vehicles, and as such cannot be held to invalidate sales."

Willys-Overland Inc. vs. Holliday, 284 S. W. 973.

We submit that the Texas logic in the decision 282 S. W. 791 shows a true understanding of distinguishing between a statute to prevent theft of motor vehicles and a private bilateral insurance contract executed by insured and left partly executory as to insurer upon the happening of a

certain contingency. In this case Mrs. Nelson very definitely suffered a loss (R. 82).

"The purpose for which this act was passed is clearly expressed in the caption of the bill. It is to prevent the theft of motor vehicles . . . Its purpose was not to prevent fraudulent sales and transfers. The theft of motor vehicles has no relation to sales and transfers, and can therefore furnish no ground for legal inference that it was the intention of the legislature to prevent such sales and thereby render unenforceable contracts in regard to property. This it seems to us is clear."

Hennessey vs. Automobile Owners Ins. Assoc., (1926 Texas) 282 S. W. 791, 793, reversing 273 S. W. 1024

See also in the same volume:

American Lloyds vs. Gengo, 282 S. W. 957.

"The fact that the requirements of said statutes were not observed in the sale of the automobiles to said motor company will not defeat a recovery on the insurance policy sued on."

First State Bank of Odano vs. Fidelity Union Fire Insurance Company, 116 Tex. 132, 287 S. W. 50, 51.

Also see: National Auto and Casualty vs. Alford, (Texas 1954) 265 S.W. 2d 862.

The Idaho Statute is regulatory and not mandatory or even prohibitory as regards transactions between parties.

> Dissault vs. Evans, 74 Ida. 295, 261 P2d 822 134 ALR 652.

Undoubtedly the majority rule, and possibly the unanimous rule by which it is to be determined whether the insured had an insurable interest in the destroyed property is that stated by the decision in 1896 of the U. S. Supreme Court in Harrison vs. Fortlage, 161 U. S. 57 116 S. Ct. 488, 490, 40 L. ed. 616, 619, as follows:

> "It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title, or lien upon, or possession of the property."

Idaho has, plainly so held by implication.

The certificate of title issue inserted by defendant to this lawsuit is immaterial and irrelevant regarding the question touching insurable interest in Idaho.

> Alliance Insurance Co. vs. Enders, 293 Fed. 485;
>
> Carroll vs. Hartford Fire Insurance Co., 28 Ida. 466, 478, 154 Pac. 985, 988;

Merrill vs. Federal Crop Insurance Co., 67 Ida. 196, 174 P2d 834;

Sweeney and Smith Co. vs. St. Paul Insurance Co., 35 Ida. 303, 206 Pac. 178;

Young vs. California Insurance Co. et al, 55 Ida. 682, 46 P2d 718.

U. S. vs. Ken, 136 F. Supp. 771.

The Bill of Sale was recorded by appellant affording constructive notice of record and plainly stated thereon the consideration paid for the trailer home by appellant and also who signed the Bill of Sale (R. 57 and Exhibit 4). The trailer home was in open, notorious and plain view to all and lived in by appellant (R. 65).

The case of Allen vs. Phoenix Insurance Co., 12 Ida. 652, 88 Pac. 245, should put at rest any doubt as to the Idaho requirements of a prima facie case by insured. Further, this same case although not directly in point is the guidepost of Idaho law governing the defenses raised by respondent. Such attempted defenses simply were not proven by appellant under the Idaho laws. The Allen case says:

> "As stated in the original opinion, if the title disclosed was held to be short of the requirements contained in the policy, still it would not defeat the right to recover under the policy, if it could be shown that the insured, in their application, truly represented the

> state and condition of the title of the property. In such casce, the insurer could not insert a contrary provision in the policy with knowledge of the true condition of the title, and thereby bind insured and defeat his right of recovery in case of loss, and after having received the premium."

Not only were all details surrounding the purchase of the trailer home by Beatrice Nelson a matter of public record (Exhibit 4), or plainly observable to H. Dean Peterson, but the only mis-statement appearing in the record was that made by the appellee through its agent when the agent supplied the actual cost when purchased including equipment of Five thousand ($5,000.00) Dollars (R. 104), in the policy, and there is no doubt but that the agent did not get this information from the insured but supplied it himself (R. 104). There is further the maybe salient but very obvious fact in the record that the insured did not mis-state any facts whatsoever to the insurer! In fact, this is not contended in the pleadings or otherwise by the respondent. The salient albeit not material facts should be noted that Supreme Trailer Sales according to the testimony of its officers transferred the possession for purposes of sale of the trailer home to Southwest Mobile Homes Sales Corporation and that Southwest Mobile Homes Sales Corporation brought the trailer into the state of Idaho, and that the Idaho law (Section 49-405, I. C.) provides "In all cases of transfer of motor vehicles the application for Certificates of Title shall be flied within seven days after the delivery of such motor vehicles,

provided, dealers need not apply for Certificate of Title for such motor vahicles in stock and *when such are acquired for stock purposes.*" (Our italics).

The record indicates that the property was thus transferred between these companies without transfer of the title certificate or attempt to transfer title certificate.

See: Section 49-405, Idaho Code, section 49-421, Idaho Code and section 49-404, Idaho Code.

In Idaho it is not necessary to apply for a Certificate of Title for seven days after possession and the application of the minority rule if applied in Idaho would result in complete havoc, as few, if any purchasers would have their title certificate at the time that they insure their vehicle and would under such minority rule than not have an insurable interest at the time the policy was issued resulting from such application, as in the instant cause, a windfall profit for the insurer.

Wombule vs. Dubuque Fire & Marine Ins. Co., 316 Mass. 142, 37 N.E. 2d 263.

A purchaser has seven days in which to apply. This rule is regulatory or directory, not mandatory.

Johnson vs. Bennion, 70 Ida. 33, 211 P2d 148.

As previously noted, the statutes of Idaho also provide (section 49-405, Idaho Code) that in cases of transfer, the

application for certificates of title shall be filled *within seven days* after the delivery of such motor vehicles. If one follows the trial court's decision to a logical conclusion, it simply adds to the morality problem. It will give unnecessary, unjust and unexpected additional windfalls to the insurance companies, all, of course, in violation of their contractual obligations, and this to the detriment of the innocent policy purchaser. To cite a pertinent example, let us say that a purchaser of an automobile from a dealer immediately upon purchasing the same secured insurance protection and was told by the company that he had insurance coverage on the same. However, the certificate of title was then later applied for, as in most cases it is, after the insurance policy is taken but within the seven days period. A loss thereafter occurs. In such instance, of course, the insurance company would have, under the District Court's decision, plain right to assert that there was no insurable interest as a certificate of title was not issued at the time the policy was issued. (Sec. 41-201 (14), Idaho Code "An interest in property insured must exist *when the insurance takes effect . . .*" (our italics). Appellee and the trial court hold one has no interest in a motor vehicle without having obtained a certificate of title. Surely this overlooks the commerce of the day, the business of the world, and reflects upon the very morals of our society. Justice being an equal thing, applied impartially, it is difficult to see how in all fairness such a conclusion could be adopted by this circuit. However, this is the sure result obtained from extending the logic of the District Court decision to its ultimate end. It is only a

matter of degree as to the amount of neglect. One may waste two weeks, three months or six months before applying for a title. But this neglect in all legal or moral considerations should not affect insurable interest.

Beatrice Nelson properly acquired her title certificate under Section 49-405, Idaho Code, which provides:

> "If a certificate of title has not previously been issued for such motor vehicle in this State, said application, unless otherwise provide for in this chapter, shall be accompanied by proper Bill of Sale or duly certified copy thereof, or . . ."

It should be pointed out that for a time the cases suffered from a misconception and confusion by the Courts of the sole ownership provision which was in the former New York Standard form with the insurable interest requirement. It might be noted that in the policy now before the Court the sole ownership provision is *not* in the policy. Under Idaho law it would make no difference if it were as sole ownership is not required in spite of such provision.

> Carroll vs. Hartford Fire Ins. Co., 28 Ida. 466, 154 Pac. 985.

In one of the minority states, Georgia, the original misconception and confusion of sole ownership provision with insurable interest expressed by obitur dictum in Giles vs. Citizen's Insurance Co., 32 Ga. App. 207, 122 S. E. 890 has been later clarified on this distinction.

Alliance Insurance Co. vs. Williamson, 36 Ga. App., 137 S.E. 277.

"This court has held that the word 'interest', as applied to property, is broader than the word 'title'. It is practically synonymous with the word 'estate' . . . 'An estate is defined to be the quantity of interest which a person has, . . . from absolute ownership down to naked possession'."

Providence Washington Ins. Co. vs. Pass, 12 S E. 2d 460.

Also the confusion has been a great deal clarified by a statement of the Kansas Court, one of the minority states.

"For purposes of the Service Co. policy, taken out on December 28th, did insured have an insurable interest in the White truck and the tank on December 30th? He argues that he did not (and the lower court so found) for the reason that as of that date he had not yet received a bill of sale and a certificate of title. Sorenson vs. Pagenkopf, 151 Kan. 913, 101 P2d 928 (cases cited). We find no fault with those decissions, but they are not in point to the case at hand for the reason that they were either possessory actions or else the question of insurable interest was brought in issue by virtue of a failure to comply with the regulatory and penal provisions of the statute governing the sale and exchange of automobiles. Furthermore,

there is no claim that the insured violated any of the provisions of G.S. 1047 Supp. 8-135, so as to affect adversely his title to the White truck. *A person may actually own and operate an automobile and thus have an insurable interest in it and yet not have legal evidence of title.* Insurable interest has been defined as: 'The principle may be stated generally that anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction.' 29 Am. Jur. Insurance Sec. 322, P. 293 * * *

"Under all of the facts and circumstances, we have no difficulty in holding that for the purposes of the Service Co. policy issued on December 28, insured had an insurable interest in the White truck and tank."

Weaver vs. Hartford Fire Insurance Co. 168 Kan. 80, 211 P2d 113.

A full discussion of the problems here is contained in Votaw vs. Farmers Automobile Inter Insurance Exchange (1938 Cal.) 76 P2d 1174, 85 P2d 872, 874, 875:

"That is to say, that should the parties fail to comply with the statutory requirements, the 'title' to the automobile should be deemed 'not to have passed': nor shall the 'transfer' be deemed complete or valid for any purpose. It is apparent that one may have

'title' to a thing and not be its owner; likewise, would it be possible for one who holds the naked title, to 'transfer' the property to another without the ownership therein being at all affected. On the other hand, one who is the equitable owner of property may convey his rights therein without any effect being produced in the legal title thereof. *For example, had one purcased an article of personal property, but had had to deliver into the possession of another to whom a Bill of Sale or other evidence of ownership had been given, there would be no doubt that the one who had furnished the money for such purchase at least would be the equitable owner of such property.* It therefore would seen not impossible that the language of the statute to which attention had been directed may affect the legal title, as distinguished from equitable ownership of or interest in an automobile (cases cited)"

Also see Wyman vs. Security Ins. Co. of California, 202 Calif. 743, 262 Pac. 329.

In one of the minority jurisdictions the court said:

"Concerning the question of plaintiff's title to the semi-trailer, defendant asserts that there was no competent evidence thereof and that plaintiff, therefore, was not shown to have an insurable interest in the property, and the oral contract of insurance was void. It was not necessary for plaintiff to show absolutely

conclusive proof of ownership of the vehicle to be entitled to have his case submitted to the jury. It was sufficient for that purpose that a prima facie showing of ownership be made. Plaintiff clearly made such a showing of ownership. The title to the semi-trailer was not directly involved in this suit at all. It was only collaterally or incidentally involved. Esty vs. Walker, 222 Mo. App. 619, 3 S.W.2d 744; See also Carpenter vs. Gwendler Mac. Co., 162 Mo. App. 296, 141 S. W. 1147.

"We agree with the statement of the trial court in the memorandum filed in this overruling of defendant's motion for a new trial that, under the authority of Crawford vs. General Insurance Corp. Mo. App. 119, S. W. 2d 458 and Saffran vs. Shade Island Ins. Co. of Providence, R. I., Mo. App. 141 S. W. 2d 98, the demurrer to the evidence raising the question of sufficiency of plaintiff's title were properly overruled * * *"

Meier vs. Eureka (Mo.) 168 S. W. 2d 127, 133-134.

It is obvious that the statutory provision that "title" to an automobile shall not be demmed to have passed or "transfer" thereof be deemed complete until certificate of title is issued deals only with "title" and "transfer" and does not affect property right or right of ownership or interest in an automobile. The Idaho Court has adopted the rule in Al's

Auto Sales vs. Moskowitz, 203 Okla. 611, 224 P2d 588, 591, 592 and in such case the Oklahoma Court said:

> "It is contended by plaintiffs that the sale of the automobile in question was illegal and void for failure to comply with the provisions of the Motor Vehicle License and Registration Act, Title 47 O. S. A. Sec. 22 et seq., in that no certificate of title was delivered to defendant Cross Motor Company, or by said company to Moskowitz. This contention is untenable. The act does not expressly provide that sales made without complying with the requirements shall be void and a violation of said act does not invalidate the sale or prevent title from passing. McNeil vs. Larson, 171 Okla. 608. 43 P2d 397, following Parrot vs. Gulick, 145 Okla. 129, 292, P. 48.
>
> "Plaintiffs, under the facts in this case, cannot recover by reason of the certificate of title; such certificate of title to an automobile issued under a motor vehicle code is not a muniment of title which establishes ownership, but is merely intended to protect the public against theft and to facilitate recovery of stolen automobiles and otherwise aid the state in enforcement of its regulation of motor vehicles. Adkisson vs. Waitman, Okla. Sup., 213 P2d 465 and cases cited therein.
> "Where one of two innocent parties must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third

party to perpetrate the wrong or cause the loss. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, Text 121, 47 So. 942, 16 Ann. Cas. 1054."

The Idaho Court in modifying Lux vs. Lockridge, 65 Ida. 639, in Dissault v. Evans, 74 Ida. 295, 261, P2d 822;

". . . plaintiff is estopped from claiming title as against a bona fide purchaser for value, from the dealer without actual or constructive notice of the conditions on which the car was delivered to the dealer."

* * *

"Appellants argue a person cannot deal with another, thinking he is the principal and later attempt to bind the true principal under the apparent authority doctrine, citing 2 Am. Jur. 85, s 103. While the text so states, the appended note leads to the more pertinent subsequent statement:

'A distinguishable case, insofar as the third person relies upon the indicia of authority, is furnished in the situation in *which an agent has the possession of property* or *of a document representing the title to the same,* although the third person does not know of the principal, but deals with the agent as owner or as one having the right to dispose of the

property' p. 86. '. . . In other words, when an owner of property clothes another with *apparent title* or *power of disposition*, third persons induced to deal with him, will be protected. The fact that the possessor of such external indicia of power may abuse the confidence of his principal does not prevent a sale to a fair purchaser from divesting the principal of title' p. 96, Sec. 114.

"The latter quoted text is the controlling thought appropiate herein.

"In law, equity, good conscience, and even-handed justice, the judgment should be and is affirmed" (Italics Ours).

See also:

Johnson vs. Bennion, 70 Ida. 33, 211 P2d 148;

Marley et al vs. McFarland et al, (Idaho Ct., Jan. 21, 1958, 8545);

Texas Company vs. Peacock, 77 Ida. 408, 293 P2d 949.

The Idaho Cases are clear on this. In fact, they are so clear that, as the record discloses, the purchaser and insured Beatrice Nelson sold the property (R. 150) and no legal action was brought against the insured in this case by either the manufacturer, the selling agent of the manufacturer or

the surety for the manufacturer (R. 124-125, R. 150, 145). It might be noted that the manufacturer delivered possession to a corporation, which corporation allegedly had full "title" and "authority" to conclude a sale and take payment (R. 135) though no "certificate of title" of any kind was transferred or given to such selling corporation (Record). The agent Roberts of the selling corporation normally had authority to accept payment for the selling corporation (R. 117-118). The insured, Beatrice Nelson, obtained an Idaho title when it was necessary to make a sale of the trailer house and then assigned such title to the subsequent purchaser through her.

A principal in the state of Idaho is bound by the contracts of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding that they are in violation of private limitations upon his authority of which the person dealing with him, acting in good faith, has no knowledge. This same rule applies both to the actions of agents of respondent, New Hampshire Fire Insurance Company, and to Joseph Roberts, the agent of Supreme Trailer Sales and Southwest Mobile Homes Sales Company.

Scowcroft vs. Roselle, 77 Ida. 142, 289 P2d 621;

Hahn vs. National Casulty Co., 64 Ida. 684, 136 P2d 739;

Mabee vs. Continental Casulty Co., 37 Ida. 667, 219 Pac. 598;

Charlton vs. Wakimoto, 70 Ida. 276, 216 P2d 37;

Commonwealth Casulty Co. vs. Arrigo, 160 Md. 595, 154 Atl. 136;

Fullweiler vs. Trailer and General Ins. Co., 59 N.M. 266, 285 P2d 140;

Marley vs. McFarland et al (Idaho 1958) number 8545;

Texas Company vs. Peacock, 77 Ida. 408, 293 P2d 949.

Is it not obvious in the record that Roberts had apparent authority to sell the damaged trailer under the Idaho rules of law?

We submit to this Court in all earnestness that the Certificate of title argument showing or not showing an insurable interest is nothing more nor less than a device to secure a windfall to the insurers in such cases as this. Actually, the facts in the records now before this Court show without contradiction that the most that can be asserted is that Beatrice Nelson failed and neglected to secure a certificate of title which might or might not be required under Idaho law. In other words, Beatrice Nelson failed to meet one requirement affecting a transfer of title to which she did eventually conform. This failure under the construction and law contended for by the respondent would result in a forfeiture of a legal

right. Such a forfeiture is not only to be abhorred but we feel to be utterly condemned in a record like this. In Idaho in a case similar to the one before the Court, the same contention regarding proof of loss was made by Martin and Martin attorneys, on behalf of insurer.

> Southern Idaho Conference Association of Seventh Day Adventists vs. Hartford Fire Insurance Co., 31 Ida. 130, 169 Pac. 616.

The Idaho Supreme Court made short shrift of such a contention!!

It is impossible to prove a negative as to what is not in the record except by referring to the record as a whole. We do so refer in commenting on the following.

The findings of fact and conclusions of law asserted by respondent's theory to be relevant are in essence based on paragraph IV and paragraph V of the Answer of Respondent.

We quote such asserted portions of the answer.

> "Specifically answering paragraphs IV and V of said Amended Complaint, this answering defendant admits that on June 12, 1956, it issued its policy of insurance to the plaintiff herein insuring the plaintiff against loss by fire and lightning in an amount not to exceed $5,000.00 but, in this connection, this defendant alleges that it issued its said insurance policy

to plaintiff herein *upon the representation of the plaintiff that she was the sole and lawful owner of said trailer, all of which representation was false and untrue and known to the plaintiff to be false and untrue . . .*" (R. 19).

"*. . . that common, ordinary care and prudence would have dictated to any reasonable prudent person that said traler house was embezzled and stolen and that the said Albert Pauls and Joseph R. Roberts were not, could not, and did not transfer any valid title whatsoever to said trailer house . . .*" (R. 20).

We submit there is nothing in the record by inference or otherwise that one word in the above italicized portion are or were true!! The respondent itself through its agent H. Dean Peterson asserted most of these allegations to be untrue (R. 103-104). The evidence shows conclusively that Beatrice Nelson did not at any time make any mis-statement of fact regarding her interest in this trailer home to appellee or others!! Further, the evidence shows plainly and without contradiction appellant, Beatrice Nelson, did not know of the Roberts-Paul alleged activities until she found out *from* and *through* appellee and its agents!! (R. 145-146, R. 72-73).

Also in paragraph II of the so-called separate defense it is alleged that the Great American Indemnity Company made demand upon Beatrice Nelson and that Beatrice Nelson turned over the trailer home to Great American Indemnity Company. The facts were not so! The allegation was unproven and is false.

It is further submitted that finding of fact IV to the effect the damage to the trailer house "not affecting the value thereof", has no support whatsoever in the evidence adduced. Further, finding of fact VI that plaintiff was not a "purchaser for value" is not only not established by the evidence, but such finding is completely shown to be false by the uncontradictory evidence! (Exhibit 4, Exhibit 5). And, further, that plaintiff was not an innocent purchaser of said trailer house is not a valid finding of fact as there is no evidence whatsoever to support that plaintiff was not an innocent purchaser, and the uncontradictory evidence is that she was an innocent purchased. Further, how the Court from the evidence adduced found that Beatrice Nelson "was fully conversant" with the prices and values of trailer houses as stated in finding of fact V is not only a doubtful conclusion but has no competent evidence in its support. Of course, finding of fact VII is irrelevant to the issue.

In regard to finding of fact VIII it can be dogmatically stated that no information requested by respondent was withheld by appellant. And, further, in regard to finding of fact VIII the evidence conclusively establishes record notice of the material facts of the purchase of the trailer house being constructive notice to respondent and actual notice to respondent through H. Dean Peterson.

There is no support whatever for finding of fact IX. As regards finding of fact X the sum of $1,200.00 is inserted despite a specific stipulation on the amount in open Court (R. 82). There is no suport for finding of fact XI.

The Conclusions of Law spring from a misconception and misapplication of Idaho Law.

The Idaho law holds that in order to rescind on the basis of fraud or sustain fraud as a defense it is incumbent upon a party asserting fraud to plead and prove (1) the particular representations that were made: (2) that they were false and fraudulent and (3) material (4) and so known to be false by the party making them; that the party asserting fraud (5) believed and (6) relied on such statements; and (7) acted upon the belief and (8) with the understanding that such false and fraudulent representations were in fact true.

Young vs. California Ins. Co.,
55 Ida. 682, 46 P2d 718;

Charlton vs. Wakimoto,
70 Ida. 276, 216 P2d 370;

Johnson vs. Hollerman,
30 Ida. 691, 167 Pac. 1030;

Weitzel vs. Jukich,
73 Ida. 301, 251 P2d 542;

Nelson vs. Hoff, 70 Ida. 354, 218 P2d 345;

Maryland Casualty vs. Boise Street Car,
52 Ida. 133, 11 P2d 1090;

Rauert vs. Loyal Protective Ins.,
61 Ida. 677, 106 P2d 1015;

Sant vs. Continental Life Ins. Co.,
49 Ida. 691, 291 Pac. 1072.

A false representation which causes no loss is not actionable. There is no fraud without loss.

Kloppenburg vs. Mays, 60 Ida. 19, 88 P2d 513.

The Idaho law is: "Fraud will not be presumed and appellants had the burden of establishing all the elements of the fraud * * * by clear and convincing evidence."

Lott vs. Taylor, 60 Ida. 263, 90 P2d 975;

Nelson vs. Hoff,
70 Ida. 354, 218 P2d 345.

It is obvious to a certainty that respondent utterly and completely failed to prove fraud on the part of appellant. We shall not belabor something so obvious with unnecessary argument. FORFEIT means:

> "To lose an estate, a franchise, or other property belonging to one, by the act of the law, and as a consequence of some misfeasance, negligence, or omission . . .
>
> "To incur a penalty; to become liable to the payment of a sum of money, as the consequence of a certain act. To incur loss through some fault, omission, error, or offense; loss."

Black's Law Dictionary, Third Edition, West Publishing Company.

The Idaho Supreme Court has never allowed a forfeiture by insured of a valuable property right! When any interest (bare possession or less) has been shown the Idaho law has never declared a lack of insurable interest, and the cases are sparse indeed for lack of such an argument to be asserted in light of the Idaho authorities.

Commercial Securities vs. Hall, 140 Ore. 644, 15 P2d 483 which in turn quotes Farley vs. Western Insurance Co., 62 Ore. 41, 124 Pac. 199 is applicable here as saying:

> "The defense is unconscionable. Defendant sent its agent out to adjust and settle the loss, and he did settle the amount of it, agreed that his company should pay it. He was not a mere adjustee or investigator. He had authority to settle, as defendant admits. Defendant cannot send out an agent clothed with such authority and trick unsuspecting claimants into a reliance on his representations, and then repudiate them by attempting to hide behind obscure clauses in the policy. There is no question as to the amount of the loss and no serious question as to the representations made by defendant's agent; and, if defendant had required further formal proof, it should, in common honesty, have notified plaintiffs to furnish them."

Under the Idaho law the letter sent to the attorney of appellant by appellee through its corporate officer admitting an insurable interest, but stating "the interest is not one of ownership but rather one of equity", which was made on November 2, 1956, two weeks after the respondent through its agents H. Dean Petersen and Stanley Smith had determined the alleged activity of the employees of Supreme Trailer Sales regarding the disposition of the $2,000.00, binds the appellee either by waiver of defense or estoppel.

After the respondent through its agent received the premium it was and is estopped to declare a forfeiture springing from facts of which it or its agents were aware either from atcual knowledge or through the public records. Under Idaho law an insurer is not permitted to defeat a recovery upon an insurance policy issued by it by proving facts which would render the policy void where the insurer or its agents had actual or constructive knowledge of such facts.

Mull vs. United States Fidelity and Guaranty Co., 35 Ida. 393, 206 Pac. 1048;

Carroll vs. Hartford Fire Insurance Co., 28 Ida. 466, 154 Pac. 985;

Young vs. California Ins. Co., 55 Ida. 682, 46 P2d 718;

McDonald vs. North River Ins. Co., 36 Ida. 638, 213 Pac. 349;

Omaha Woodmen Life Ins. Soc. vs. Krussman, 131 F2d 83;

Scott vs. Dixie Fire Ins. Co., 70 W. Va. 533, 74 S.E. 659.

and as guideposts to the direction of the Idaho law as pointed out:

"Much has been said in the briefs of counsel in this case with reference to the legal principle of mutual mistake, waiver and estoppel, and their applicability to the facts of this case. As we view the matter, the conduct of the insurance company's agent in writing a policy of insurance which did not disclose the true title or interest of plaintiffs, although they had stated the nature of that interest to the agent, knowledge of which therefore is imputed to the company, followed by the acceptance of premium on such policy by the company and the reliance of plaintiffs on its validity, effectually estops the insurance company from setting up the defense that the policy is void because the plaintiffs were not in fact sole owners of the property insured."

Carroll vs. Hartford Fire Ins. Co., 28 Ida. 466, 478, 154 Pac. 984, 988.

"An insurance company may elect, through its agent, to continue insurance with a new owner although

the policy provides it should be void for change of ownership."

Collard vs. Universal Auto Ins. Co., 55 Ida. 560, 571, 45 P2d 288.

Under an automobile liability policy, in Idaho, there is a primary liability against the insurer in favor of persons injured or damaged, of which the assured cannot by any act of his divest the injured party.

Collard vs. Universal Auto Ins. Co., 55 Ida. 560, 45 P2d 288;

Watson vs. Royal Indemnity Co., 56 F2d 409.

In the case at hand it does not seem that there could have been any question but that the appellant was in good faith. Here was a woman in a very small Idaho town. She met apparent agents of a trailer company who admittedly had not converted or stolen the trailer home albeit absconding with the money paid by appellant. She paid a consideration; furthermore she insisted that her lawyer help her with the matter. To spell out that there was not good faith or that she was not an innocent purchaser for value works an impossible hardship upon the facts as exist in this case.

Relevant dates show something much less than good faith on the part of appellee. The fire occurred September 23, 1956 (R. 24), was investigated that date by respondent's

Idaho resident agent and adjuster (R. 95). Proof of Loss was submitted October 18, 1956 (R. 52-53), and on same date the agents of respondent noted report of embezzlement on trailer (R. 96); then October 31, 1956 an Amended Proof of Loss was submitted (R. 52-53). After this on November 2, 1956 the letter sent from the office of secretary of appellee company stating in the first two paragraphs:

> "We acknowledge receipt of your letter dated October 13, 1956 enclosing therewith an amended and supplemental sworn statement in Proof of Loss under the contract in caption.
>
> "We concur with your thoughts that Mrs. Nelson does have an insurable interest in this trailer, however the interest is not one of ownership but rather one of equity" (R. 31-37 and exhibit thereto).

Then respondent on December 1, 1956, issued an endorsement to the very policy before this court (R. 167). Said endorsement amending the policy (R. 108). Although Proof of Loss was accepted (R. 62), payment was denied about December, 1956 (R. 63).

A check for premium refund was tendered to appellant at a deposition on May 2, 1957 (R. 66, R. 20)—over seven months after the fire damage and three months after suit was filed! At no time was a tender in cash made.

In spite of its contractual obligation and the admitted

damage the appellee was trying to "reneg" on its policy by paying less than that contracted for. It finally by "fishing" about found a possible asserted legal "jink" to void payment. A man who breaks his word is contemptible. A person or party not living up to a contract is reprehensible. We avoid dealing with them in the market place. One would be safer in dealing with a common bookie at a race track than with a company, no matter how formidable its assets or title, which breaks its moral obligations. Admittedly, arguments based on our Constitution are not in fashion, however, the sanctity of contract was thought so highly of when this Republic was formed that the following clear and unambigous language is to be found in the present Constitution as originally adopted:

> "No state shall . . . pass . . . law impairing the obligation of contracts, . . ."
>
> Article I. Section 10 (2)
> Constitution of the United States of America.

Note the words "impairing the obligation of contracts". It is not freedom to contract as so many of our rights are secured. but that the obligation will not be impaired. In other words, the moral value of living up to a contract, is not only the foundation of this society, but is written into our fundamental law. Appellee grasps at this ancient English doctrine originally adopted for life insurance and needlessly carried over into insurance law generally. We find nothing in the Idaho law that would exted this vicious, immoral and needless defense other than within strict limits. We consider the ar-

gument of sanctity of contracts extremely material to this cause. Government Bureaus and regulations flourish when the courts err. Liberty becomes lost when government control flourishes. Appropriate comments were made by the Alabama Court recently.

> "The position of the defendants seems to be that if murder results the insurance companies are, of course, sorry that the insured met with such a fate, but they have no liability if there is no insurable interest although they can treat such policies as completely void . . . In other words, the defendants seem to be of the opinion that the insurable interest rule is to protect insurance companies. We do not agree. The rule is designed to protect human life . . .
>
> "As we have shown it has long been recognized by this court and practically all courts in this country that an insured is placed in a position of extreme danger where a policy of insurance is issued on his life in favor of a beneficiary who has no insurable interest . . ."
>
> Liberty National Life Insurance Company vs. Weldon, (Alabama, 1957) 100 So.2d 696, 708.

Surely, if the moral circumstances of this case are considered, it is absolutely unfair and unjust and contrary to Idaho law or equity to hold that Beatrice Nelson is not en-

titled to fulfillment of the insurance contract. Furthermore, to allow an insurance company to raise the validity of the title of the appellant when the trailer company itself is not a party to this suit and does not claim an adverse title is almost ridiculous in its consequences. Realizing that insurance companies are in business to make money, it is still only legally and morally right that they be required to live up to their contractual obligations, and under the decision of this case, as determined by the trial judge upon the records, facts, and evidence as submitted to him, the insurance company is allowed to avoid its contractual obligation. Apart from the obvious result that the insurance company thus invokes a defense often disallowed even an innocent title holder in Idaho, the record shows the mischief in the rules of evidence. As against a title claimant the conversations of its agents are admissable while as against the insurance company the relevant conversations on what occurred in a purchase are not allowed as being hearsay not in the presence of the insurance company or its agents (R. 84)).

A paragraph should concern itself as to with whom the responsibility should lie for securing the factual information surrounding a prospective insureds right to ownership, status of title and right to possession. How simple and easy for the insurer to fully inquire of a prospective insured of all and any facts felt relevant by insurer as a condition to issuing a policy! An insured can do no more than state answers to inquiries by an insurer as to what the insurer feels is relevant. We submit, that the better rule extending insurable interest will

simply result in the insurer asking questions before issuing its policy.

Idaho has unequivocally adopted the rule of Al's Auto Sales vs. Moskowitz that where one of two innocent parties must suffer, the party who places another in a position to do harm should sustain the consequences; or, otherwise stated, the loss should fall upon the one who by its conduct created the circumstances which enabled the third party to perpetrate the wrong.

Dissault vs. Evans, 74 Ida. 295, 261 P2d 822.

But in the cause before the Court involving this insurance claim no innocent party need suffer. Application of Idaho law, prevents and prevented the purchaser Beatrice Nelson from losing ownership regardless of her not timely obtaining a certificate of title. In the present cause the actuarial considerations having been met, the identity of the trailer home having been definitely and conclusively established, the insured having paid the policy premium, application of the rule adopted by The Honorable District Court results in a windfall to appellee!! The appellee becomes unjustly enriched. The appellant in turn suffers a windfall loss. Should insured be responsible for the fire loss to any superior title claimant as a bailee by operation of law or conversion, although she prudently purchased insurance for fire protection, she would bear the loss out of pocket. In Idaho the law, good conscience and even-handed justice would prevent this. The Idaho law was not followed by the Court below.

Attention is called to a statement of the trial court concerning our cross-examination of the resident agent of appellee, who countersigned the policy of appellant.

> "The Court: I seriously doubt whether he comes in the category of a person subject to cross-examination under the Rule . . ." (R. 54).

It can be presumptively assumed the Court understood the Federal Rule allowing cross-examination of such agents. The misconception of Idaho law then is obvious. The Idaho Supreme Court has said in view of Sec. 40-901, Idaho Code, and Sec. 40-902, Idaho Code.

> "That an agent of a foreign insurance company who has power to solicit and take appliactions, collect premiums, and countersign and deliver policies, may bind his principal . . . or may waive a policy requirement . . . , and the company is estopped from denying authority to make such waiver . . ."
>
> Collard vs. Universal Automobile Ins. Co., 55 Ida. 560, 45 P2d 288.

The misconception or misapplication of Idaho law in this cause becomes even more manifest and plain.

The exact point at issue has not been decided in Idaho, but the decisions generally and analogous situations point clearly to the Idaho rule.

Respondent invoked its absolute right to removal for the plain and simple purpose of escaping the application of Idaho rules of law. It succeeded. The judgment of the lower Court, in effect, creates two bodies of substantive law in Idaho. The announced Idaho law as against the federal doctrine applying the law of five or six foreign states.

In order to effect a cancellation of a policy the insurer must tender the premium to insured, or the insurer cannot be heard to complain.

> "It is also thought that defendant failed to give the requisite notice. Granted that no particular form of notice is required, still it must be shown either that the insured has actual knowledge of the insured's intention to cancel, or that such intention has been so expressed as to give notice to the ordniary man in the exercise of ordinary care."
>
> Grant Lumber Co. vs. North River Ins. Co. of N.Y. (Dist. Idaho) 253 Fed. 83 (Excellent discussion on premium refund).

Thus under Idaho law a policy cannot be cancelled without notice of such cancellation given to the insured, and " 'the policy not being rightfully cancelled, it remained in full force and effect, . . .' ".

> McDonald vs. North River Ins. Co., 36 Ida. 638, 646, 213 Pac. 349, 351.

The rules of law of Idaho have been so set forth to preclude the injustice which has thus far been worked in this case. In this case the record shows a total failure of the insurer to abide by the contract terms in declaring a cancellation of what insurer felt to be a void contract. Although there are rules of law in other jurisdictions to the contrary, under the rules of law of the state of Idaho such following of the contract terms to cancel a void policy has in the above cases been dogmatically and unequivocally held to be an absolute necessity.

Attention is chiefly called to paragraph 13 of the conditions set forth in the policy as well as paragraph 2 of the conditions of the policy (Exhibit 4). Although the cancellation provision 13 requires the insurer to mail or deliver to the insured written notice stating when not less than five (5) days thereafter, such cancellation shall be effective, neither New Hampshire Fire Insurance Company nor its agents ever mailed to Beatrice Nelson or delivered to Beatrice Nelson such cancellation notice or stated when it would be effective or otherwise met any conditions to void the policy. We submit the Idaho law is plain on this. The asserted defenses are thus not allowable and the insured must be and should be paid.

In summary, the Idaho law favors the insured, never allows forfeiture of an insured's right once a premium is paid, has expressly held that a purchaser for value has an "interest" and even ownership in a motor vehicle regardless of failure to secure a certificate of title, and nowhere in such

law is there found the vaguest hint that title defects defeat an insurable interest, rather the contrary being plain by analougous situations, that a title certificate is in no way related to insurable interest or to an insured's right to recover. And the evidence shows no cancelling or voiding of the policy by insurer.

This contract of insurance having been entered into after effective date of Section 41-1403, Idaho Code, the insurer having failed to meet its contractual commitment, attorney fees "as the Court shall adjudge reasonable" should be awarded. We submit that the record in this cause shows at least one thousand five hundred dollars ($1,500.00) would be a reasonable sum to award respondent for attorney fees.

It is submitted, therefore, that judgment should be rendered for and on behalf of the appellant, Beatrice Nelson, in this action against New Hampshire Fire Insurance Company for the sum of four thousand six hundred twenty-seven and 50|100 ($4,627.50) Dollars stipulated damage to the trailer home insured, and one thousand five hundred and no|100 ($1,500.00) Dollars attorney fees, or for the total sum of six thousand one hundred twenty-seven and 50|100 ($6,127.50) Dollars, and costs of this action incurred.

L. CHARLES JOHNSON

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APPENDIX

EXHIBITS

Plaintiff's			
1. Proof of Loss	R 52	R 52	R 52
2. Amended Statement	R 52	R 52	R 52
3. Insurance Policy	R 53	R 53	R 54-55
4. Bill of Sale	R 57	R 57	R 57
5. Check	R 57-58	R 58	R 58
6. Invoice	R 58-59	R 59	R 59
14. Endorsement	R 106-108	R 108	R 109
Defendant's			
8. Photograph	R 70	R 72	R 72
9. Photograph	R 70	R 72	R 72
10. Photograph	R 70	R 72	R 72
11. Memorandum	R 90	R 91	R 91
16. Freight Bill	R 119-120	R 120	R 120
18. Inspection Sheet	R 138	R 139	R 139

I certify that I mailed three copies of the above Brief of Appellant by depositing three copies thereof, on the eighteenth day of July, 1958, with sufficient postage on envelope in the United State Government mail receptacle addressed to the following:

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